

EMANUEL LAW FIRM  
Sacha V. Emanuel (SBN 218705)  
svemanul@gmail.com  
Raphael B. Emanuel (SBN 218755)  
remanuellaw@gmail.com  
1875 Century Park East, Suite 2150  
Los Angeles, California 90067  
Telephone: (310) 881-6814  
Facsimile: (310) 881-6801

Attorneys for Plaintiff/Counter-Defendant  
Neofonie GmbH

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

NEOFONIE GMBH, a German  
corporation,

Plaintiff,

vs.

ARTISSIMO DESIGNS LLC, a  
Delaware limited liability company,

Defendant.

AND COUNTERCLAIM

Case No.: 8:17-cv-00772 CJC (JDEx)

**NOTICE OF MOTION AND  
MOTION IN LIMINE OF  
NEOFONIE GMBH TO EXCLUDE  
LAY WITNESSES FROM GIVING  
AN EXPERT OPINION**

**MOTION *IN LIMINE* NO. 2.**

Hon. Cormac J. Carney

Hearing: January 14, 2019

Time: 3:00 p.m.

Place: Courtroom 7C, 350 W. 1<sup>st</sup> St.  
Los Angeles, California 90012

**TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS:**

**PLEASE TAKE NOTICE** that on January 14, 2018 at 3:00 p.m., or as soon thereafter as this matter may be heard before the Honorable Cormac J. Carney of the United States District Court for the Central District of California, at 350 W. 1<sup>st</sup> St., Los Angeles, California 90012, Plaintiff/Counter-Defendant, Neofonie GmbH, (“Plaintiff” or “Neofonie”)) will and hereby does move for the exclusion of evidence based on Federal Rules of Evidence Nos. 401, 402, 403, and 701.

Plaintiff anticipates that that Defendant/Counter-Claimant, Artissimo Designs, LLC, (“Defendant”), intends to offer into evidence at the trial set to begin on January 22, 2019 evidence and arguments concerning issues, matters, and/or areas that require the opinion of an expert, such as:

(1) Whether or not Neofonie adhered to basic usability principles that were common best practices in performing its development work on the minimum viable product (“MVP”) for the website, *artdesigns.com*;

(2) What items, deliverables, features, or sub-features are required for the basic functionality or usability of an e-commerce MVP;

(3) Whether the MVP at issue in this action was usable by or functional to Defendant’s customers;

(4) The propriety of Neofonie’s decision making in developing certain deliverables, features, or sub-features from scratch rather than using standard out of the box components;

(5) Neofonie’s use of common best practices in developing the MVP;

(6) The process concerning the testing, discovery, and fixing of bugs on an e-commerce MVP project and whether the process at issue was outside of normal industry standards;

(7) The migration of an MVP from a test environment to a live environment;

1 (8) The frequency and effect of budget and time overruns on an e-commerce  
2 MVP project; and

3 (9) Whether or not Neofonie timely or adequately integrated the MVP with  
4 Defendant's AX software.

5 This Motion is made on the grounds that evidence of this nature constitutes  
6 improper lay opinion; and is confusing, wasteful, and prejudicial.

7 This Motion is based on the Notice of Motion, the Memorandum of Points  
8 and Authorities, files in this action, Declaration of Sacha V. Emanuel ("Emanuel  
9 Decl."), the exhibits attached thereto, the supporting documents filed concurrently  
10 herewith, and upon such oral argument and submissions that may be presented at or  
11 before the hearing on this Motion. Plaintiff asks this Court for an Order directing  
12 Defendant's counsel to caution, warn, and instruct their witness to follow the same  
13 order.

14 Pursuant to Local Rule 7-3, this Motion is made following the conference of  
15 counsel that took place on December 10, 2018.

16 Respectfully submitted,  
17 Dated: December 17, 2018 EMANUEL LAW FIRM

18  
19 By:/s/\_\_\_\_\_  
20 Sacha V. Emanuel  
21 Attorneys For Plaintiff  
22  
23  
24  
25  
26  
27  
28

## I. INTRODUCTION

In this action, Plaintiff/Counter-Defendant, Neofonie GmbH, (“Plaintiff” or “Neofonie”) seeks payment of money owed by Defendant/Counter-Claimant, Artissimo Designs, LLC (“Defendant”), in connection with work Plaintiff performed in developing, testing, and attempting to launch a minimum viable product (“MVP”) for a new e-commerce website, *artdesigns.com*.

Pursuant to a written agreement, Neofonie and Defendant were required to “work together” to develop, test and launch the MVP. Neofonie performed its end of the agreement by delivering to Defendant all the contractually agreed-upon deliverables, features, and sub-features, developed and tested according to the MVP definition. Defendant breached the agreement by, among other things, failing to pay Neofonie, despite repeatedly promising to do so, and failing to obtain a license for the content management system Magnolia which was a must-have prerequisite for the MVP to go live.

After filing this action, Neofonie designated an expert witness, Dr. Ali Khoshgazaran, who prepared a detailed report supporting Neofonie’s position and refuting many of the arguments and positions taken by Defendant in its Counterclaim. Defendant failed to designate an expert or rebuttal expert to support any of its defenses or claims.

In its Counterclaim, however, Defendant has made numerous allegations which require the opinion of an expert to prove. These allegations include, without limitation, that:

- Neofonie ignored “basic usability principles that were common best practices.” (See Counterclaim (“CC”) ¶18 attached to the Declaration of Sacha V. Emanuel as Exhibit 1)
- That certain items of the MVP “are required for basic functionality of an e-commerce site” (CC ¶21);

- That the MVP delivered by Neofonie could not be used by Defendant’s “customers” (CC¶ 23);
- That Neofonie erred in its development work by not “implementing standard non-custom industry standards” or out of the box software;
- That Neofonie failed to implement “best practices” (¶¶32 and 35); and
- That Neofonie failed to “produce a functional online shop” (¶47).

As these and other areas require the opinion of an expert, and Defendant has failed to designate one, Defendant should be precluded from offering testimony from a lay witness in regards to these and other areas. Admitting this improper testimony through live testimony at trial would allow Defendant to offer an expert in “lay witness clothing” and thus evade the evidentiary requirements for expert witnesses.

### **III. ARGUMENT**

#### **A. Inadmissible Opinion (FRE 701)**

The testimony of a lay witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) “rationally based on the witness’s perception,” (b) “helpful to clearly understanding the witness’s testimony or to determining a fact in issue,” and (c) “not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” FED. R. EVID. 701.

Defendant should be precluded from introducing inadmissible opinion testimony from its employees or other lay witnesses such as that Neofonie did not use “best practices”, “ignored basic usability principles”, or otherwise did not act reasonably in developing or testing the MVP. Nor should Defendant be permitted to introduce lay opinion testimony regarding any issues, areas, or matters that require scientific, technical, or other specialized knowledge, such as the integration of the MVP with Defendant’s AX software.

1           Additionally, all witness testimony opining on the ultimate legal question is  
 2 prohibited. See, e.g., Torres v. City. of Oakland, 758 F.2d 147, 150 (6th Cir. 1985)  
 3 (“The problem with testimony containing a legal conclusion is in conveying the  
 4 witness' unexpressed, and perhaps erroneous, legal standards to the jury.”). Hence,  
 5 Defendant’s opinion that the MVP was not “usable” or “functional” is not  
 6 admissible. See, e.g., Smith v. Pac. Bell Telephone Co., Inc., 649 F. Supp. 2d 1073  
 7 (E.D. Cal. 2009) (sustaining objections to admission of lay person’s affidavit  
 8 stating that he had notified the defendants of problems with a GPS system and that  
 9 they then failed to investigate, finding that there was “nothing in the affidavit to  
 10 establish [the declarant] [wa]s knowledgeable about or qualified to opine on the  
 11 reliability of GPS equipment.”).

12           **B.     Where Evidence Is More Prejudicial than Probative, or a Waste of**  
 13           **Time, The Court May Exclude Such Evidence.**

14           Rulings on motions *in limine* are committed to the discretion of the trial  
 15 court. Campbell Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980) (district  
 16 court has “broad discretion to make . . . evidentiary rulings conducive to a fair and  
 17 orderly trial”). District courts can exercise their discretion to exclude evidence  
 18 where the evidence is not relevant, or where the probative value is outweighed by  
 19 other considerations. Fed. R. Evid. 401-403; Wicker v. Oregon ex rel. Bureau of  
 20 Labor, 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not abuse  
 21 discretion in excluding conclusive, speculative evidence). Even if evidence is  
 22 considered relevant, evidence may be excluded when its probative value is  
 23 substantially outweighed by the danger of unfair prejudice, confusion of the issues,  
 24 or misleading the jury.” Fed. R. Evid. 403; Dream Games of Arizona, Inc. v. PC  
 25 Onsite, 561 F.3d 983, 993 (9th Cir. 2009) (district court did not abuse its discretion  
 26 in granting plaintiff’s motion in limine to exclude evidence based on concerns that  
 27 it might improperly influence the jury on the amount of statutory damages to assess  
 28

1 under 504(c)(1) of the Copyright Act of 1976, because the evidence did not provide  
2 sufficiently probative information.) Evidence has probative value only if it has any  
3 tendency to make the existence of any legally necessary proposition in the case  
4 more or less likely. Fed. R. Evid. 401-402.

5 For the reasons set forth above, the Court may also exclude evidence  
6 regarding the above-referenced issues, areas, and matters on the grounds that it is  
7 more prejudicial than probative, or a waste of time.

#### 8 **IV. CONCLUSION**

9 For the foregoing reasons, Neofonie respectfully requests that this Court  
10 issue the order *in limine* requested. order as follows:

11  
12 Dated: December 17, 2018

13 EMANUEL LAW FIRM

14  
15 By: /s/  
16 Sacha V. Emanuel  
17 Attorneys for Plaintiff  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28